

FCC MAIL SECTION

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Federal Communications Commission

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DISTRICT

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
1998 Biennial Regulatory Review --) MM Docket No. 98-43
Streamlining of Mass Media Applications,)
Rules, and Processes)

NOTICE OF PROPOSED RULE MAKING

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By the Commission (Commissioner Furchtgott-Roth issuing a separate statement):

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I. Introduction

1. With this *Notice*, we commence a proceeding to consider fundamental changes in our broadcast application and licensing procedures. Our goals are to reduce applicant and licensee burdens, realize fully the benefits of the Mass Media Bureau's current electronic filing initiative, and preserve the public's ability to participate fully in our broadcast licensing processes. This proceeding is premised on our belief that we can prudently increase our reliance on applicant certifications rather than more detailed applicant informational disclosures. These proposals are designed to reduce filing burdens and increase the efficiency of application processing. We recognize that this approach is feasible only if the Commission retains the capacity to verify compliance with our rules and the accuracy of application information through audits and inquiries. Thus, we emphasize that this streamlining initiative is accompanied by our commitment to sanction severely those applicants that fall short of discharging their obligations of full disclosure and complete candor, buttressed by our proposal to establish a formal system of random audits.

2. This *Notice* is part of a broad-based streamlining initiative to overhaul Mass Media Bureau policies and licensing procedures. At this time, our streamlining efforts include two additional proceedings that are pending or will soon be initiated. The Commission currently has outstanding a *Notice of Proposed Rulemaking* regarding ways to reduce undue equal employment opportunity ("EEO") program compliance burdens for broadcasters while still maintaining an effective EEO program.¹ Moreover, the Commission will shortly initiate a separate rule making to consider technical changes. That proceeding will attempt to identify ways to speed the introduction of new and improved broadcast services, provide greater flexibility to broadcasters to improve existing services, and facilitate compliance with core technical requirements.

3. The instant rulemaking is premised, for the most part, on the Commission's current regulatory framework, *i.e.*, it assumes no fundamental changes in our rules and policies relating to multiple ownership, attribution, investor insulation, control, etc.² Within that framework, the proposals made in this *Notice* represent a significant step forward. Specifically, we invite comment as to whether electronic filing should be mandatory for 16 key Mass Media Bureau broadcast application and reporting forms. In connection with this transition, we propose to revise substantially these forms to facilitate electronic application processing by replacing narrative exhibits with "yes/no" questions and certifications.³ We also believe, independent of electronic filing considerations, that expanded application instructions, new worksheets and revised forms will prove less burdensome to applicants while promoting compliance with our rules. We are confident that implementation of these proposed changes will create a better regulatory environment for both the public and the broadcast industry.

¹ *Order and Notice of Proposed Rule Making* in MM Docket No. 96-16, 11 FCC Rcd 5154 (1996).

² Some of these rules are being reviewed in other contexts, such as our attribution and ownership proceedings. *See, e.g., Notice of Proposed Rule Making* in MM Docket Nos. 94-150 *et al.*, 10 FCC Rcd 3606, 3614 (1995); *Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150 *et al.*, 11 FCC Rcd 19895 (1996) (attribution rules); *Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 & 87-8, 11 FCC Rcd 21655 (1996) (TV local ownership rules); *Notice of Proposed Rule Making* in MM Docket Nos. 96-222, 91-221, & 87-8, 11 FCC Rcd 19949 (1996) (TV national ownership rules).

³ For example, an FM licensee is currently required to file up to fourteen exhibits as part of its technical showing in FCC Form 301. As proposed, only two or three exhibits typically would be required with the revised form.

4. We emphasize, however, that the scope of this proceeding is significantly broader than electronic filing and that we seek generally to overhaul and streamline broadcast licensing processes. Although not required by statute, this initiative is undertaken in conjunction with our 1998 biennial regulatory review. In this regard, we have tentatively identified certain policies that either consume significant staff resources or create burdens that may no longer be warranted. Accordingly, we propose to eliminate: payment restrictions on the sale of unbuilt stations, the requirement to submit contracts with assignment and transfer applications, and several rules that add unwarranted filing burdens on commercial new station and facility change applicants. We consider relaxing ownership report filing requirements for commercial and noncommercial stations. This proceeding also proposes fundamental changes in our construction permit extension procedures. We believe these changes will reduce the need for repetitive extension filings. We seek comments on procedures we can adopt, consistent with statutory restrictions, to expedite the processing of *pro forma* assignment and transfer applications. Finally, we invite comment on other measures which may advance our streamlining goals.

II. Issue Analysis

A. Electronic Filing of Applications

1. *Electronic Filing Proposal*

5. *Background.* The Commission is committed to using information technology to better serve members of the public and the parties that we regulate.⁴ Accordingly, the Mass Media Bureau is currently working on facilitating electronic filing for 15 key broadcasting application and reporting forms.⁵ This project is one phase of a multi-phased effort to computerize and streamline the Mass Media Bureau's processes. In this Notice, we invite comment on whether we should make electronic filing of these applications mandatory or permissive, and, if mandatory, whether we should phase in such requirements.⁶

6. *Discussion.* We believe that widespread use of electronic filing and related processing systems will permit meaningful efficiencies in dealing with applicants, licensees, and the general public. Our goal is to create a customer-friendly environment that uses the most current filing and processing technologies.

⁴ Our web site, <http://www.fcc.gov>, has become a useful resource for the public to learn about the agency and its actions, as well as to communicate their views to the Commission. In addition, all of the agency's Bureaus have their own web pages, and our electronic mailbox allows the public to express opinions and ask questions about a variety of subjects. The Commission may be reached at fccinfo@fcc.gov.

⁵ The Mass Media Bureau is developing electronic versions of the following 15 forms: FCC Forms 301, 302-AM, 302-FM, 302-TV, 307, 314, 315, 316, 340, 345, 346, 347, 349, 350, and 5072. As noted in paragraph 8, *infra*, we also propose to require the electronic filing of Form 398, which already is available in electronic form.

⁶ In our pending proceeding on the electronic filing of rule making comments, we address implementation questions, such as how to confirm receipt by the Commission and how to address the service of copies to all relevant parties. See *Notice of Proposed Rule Making* in GC Docket No. 97-113, 12 FCC Rcd 5150, 5153-57 (1997) (*Electronic Filing in Rule Making Proceedings Notice*). Therefore, these questions will not be the subject of the instant proceeding. In the *Electronic Filing in Rule Making Proceedings Notice*, we propose to allow parties to file comments electronically in all notice and comment rule making proceedings conducted under section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, (with the exception of broadcast allotment proceedings) and to give such comments the same treatment and consideration as paper filings.

7. Electronic filing could, among other things, speed the processing of applications, save Commission resources, and make filing easier for regulatees by automatically notifying them of any critical errors or omissions in their applications even before any staff review occurs, through a series of edit checks and business validations.⁷ Such efficiencies could allow broadcasters to inaugurate or improve service to the public more quickly. In addition, because of the unique public service obligations of broadcasters, it is critical that our processes remain open to participation by broadcasters, broadcast applicants, and members of the public. We believe that electronic filing could facilitate such openness. If electronically filed applications are made available on the Internet, interested parties could examine them at home, at the office, or perhaps at the public library.⁸ We invite comment on these tentative views.

8. We invite comment as to whether electronic filing of some or all of the 15 forms listed in note 5, *supra* should be mandatory or whether electronic filing should be permissive. Making it mandatory would allow us to maximize the resource savings, cost savings, and efficiencies achievable through electronic filing.⁹ It may also permit an increase in the accuracy of the Commission's data bases, which would more accurately reflect the data filed in applications. Therefore, we seek comment on whether we should require mandatory electronic filing of all of these applications.¹⁰ Additionally, we seek comment on whether we should require that FCC Form 398, the Children's Programming Report, which can currently be filed either electronically or by paper, be filed electronically.¹¹ We seek comment on these proposals, as well as on any legal, technical, or other issues raised by mandatory electronic filing.¹²

9. While we recognize the substantial benefits of mandatory electronic filing, we also seek to avoid

⁷ For example, if a party fails to check the box certifying its compliance with the statutory alien ownership requirements, 47 U.S.C. § 310(b), then the application would not be fileable.

⁸ The public would continue to be able to review and obtain copies of electronically filed applications through the Commission's public reference room and where applicable, in the station's public file.

⁹ If electronic filing is permissive, some paper filings would have to be scanned into the Commission's system. Dealing with fewer paper filings would reduce the Commission's administrative burdens. Further, a dual filing system (paper and electronic) would reduce predictability with respect to staffing requirements in several areas, including data entry and applications processing.

¹⁰ We do not anticipate requiring that petitions to deny, informal objections, and other related documents be submitted electronically.

¹¹ The Children's Programming Report fully sets forth the informational and educational programming broadcast by commercial television broadcasters. The Report must be filed annually, although quarterly filings with the Commission are encouraged.

¹² We note that we have adopted mandatory electronic filing systems in other regulatory areas. For example, with respect to common carriers, we recently announced that we would soon require incumbent local exchange carriers ("ILECs") to file their federal tariffs and associated documents electronically pursuant to the Commission's Electronic Tariff Filing System ("ETFS"). See *Report and Order* in CC Docket No. 96-187, 12 FCC Rcd 2170, 2195 (1997); *Public Notice*, DA 97-2491 (November 25, 1997) ("*ETFS Public Notice*"). In addition, the Wireless Telecommunications Bureau is implementing a consolidated license processing system, Universal Licensing System, for the services under its jurisdiction. *Notice of Proposed Rule Making* in WT Docket No. 98-20, FCC 98-23 (released March 18, 1998) ("*ULS Notice*"). We have proposed that all applications and notifications submitted to the Wireless Telecommunications Bureau in all of the wireless radio services be filed electronically, starting in 1999.

any disruption to or harmful impact on any small businesses that may not have access to computer or Internet services. Since computer technology and Internet accessibility have become widespread, is lack of access to computer services that would permit electronic filing a significant problem? For broadcasters that lack the necessary computer and communications technology, are vendors available to assist in the preparation and electronic filing of applications? Would the cost of such services be unreasonably burdensome to those broadcasters that do not have other electronic filing options? If the lack of access to or the cost of computer services is a problem, should we create exemptions to mandatory electronic filing for small businesses or other qualifying entities? How should we define the qualifying criteria for any such exemption? Would the waiver standards or small business definitions applied by other federal agencies be useful in this regard?¹³

10. Alternatively, would any disruptive impact of a mandatory electronic filing requirement be minimized or eliminated by phasing in such requirements, *i.e.*, affording a transition period during which electronic filing would be permissive?¹⁴ Such a transition period might allow applicants and members of the public a period of time to become accustomed to the new system and to gain access to computer services if they do not already have them, and it might provide the Commission with an opportunity to address any unforeseen problems with the system.¹⁵ During such a transition period, we anticipate that businesses could arise to offer electronic filing services to those persons or entities that do not own computers or otherwise have access to the Internet.

11. If we adopt a transition period, should it be based, at least in part, on whether the filer is a small entity? Should the phase-in be done on a form-by-form basis? What phase-in dates should we use? Are there ways that we could or should encourage voluntary electronic filing during such a transition period? What incentives could we apply to do so? We note that its inherent advantages may likely be the most significant

¹³ The Commodity Futures Trading Commission ("CFTC"), for example, generally requires the electronic filing of certain daily reports by futures commission merchants. 17 C.F.R. § 17.00(a). Exemptions from the CFTC's electronic filing requirements were once liberally granted because of the relatively high cost of compliance. However, noting that lower prices have made personal computers commonplace for business applications, the CFTC recently announced that it would now examine each exemption request on a case-by-case basis. 62 Fed. Reg. 24026, 24028 (May 2, 1997). In addition, the Securities and Exchange Commission ("SEC") has established a "hardship exemption" to its mandatory electronic filing rules. Specifically, a filer may claim or request a hardship exemption based on several factors, including technical difficulties in filing and undue burden and expense of conversion to an electronic format. 17 C.F.R. §§ 232.201 and 232.202. The Small Business Administration ("SBA") has adopted small business size standards for broadcast radio and television stations in 13 C.F.R. § 121.201. According to the SBA's regulations, entities engaged in television broadcasting (Standard Industrial Classification ("SIC") Code 4833) with no more than \$10.5 million in annual receipts qualify as small business concerns. Entities engaged in radio broadcasting (SIC Code 4832) with no more than \$5 million in annual receipts also qualify as small business concerns.

¹⁴ We note that we have phased in the electronic filing requirement, or have proposed to do so, in various nonbroadcast contexts where the Commission has instituted or has proposed to institute mandatory electronic filing. For example, when we inaugurated the Electronic Tariff Filing System for local exchange carriers ("LEC"), we stated that its use would initially be permissive, but that it would soon become mandatory. We also stated that LECs would still be required to file tariffs and associated documents on paper until the end of the transition period, and that paper filing would thereafter be prohibited. *ETFS Public Notice*. Mandatory electronic filing has not yet commenced.

¹⁵ We note that phase-in procedures have been used elsewhere to benefit small businesses. For example, the SEC incorporated its mandatory filing rules in stages, phasing in most companies in 1993. See 58 Fed. Reg. 14628 (March 18, 1993); 58 Fed. Reg. 14848 (March 18, 1993); 58 Fed. Reg. 14999 (March 18, 1993). However, small businesses were not completely phased in until May 1996. 61 Fed. Reg. 13544 (March 27, 1996).

incentive. However, we request comment on other possible measures to spur electronic filing, such as higher filing fees for paper filers. We could adopt such measures during a transition phase to assure the highest possible level of electronic filing. We note, however, our tentative view that we lack statutory authority to structure filing fees based on whether the filing is paper or electronic. If we phase in mass media electronic filing, should we require parties also to submit traditional paper copies of any electronic filings during the transition? Would any such requirement be consistent with the Paperwork Reduction Act of 1995? Would such a requirement increase administrative burden, delay processing, or discourage electronic filing?

2. Applicant Identification Issues

12. *Background.* TINs are 9-digit identifiers required of all individuals and employers to identify their tax accounts. Pursuant to the Debt Collection Improvement Act ("DCIA"), Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law No. 104-34, Chapter 10, 110 Stat 1321, 1321-1358 (1996), the Commission and executive agencies are required to monitor and provide information about their regulatees to the U.S. Treasury. The statute includes a requirement that the Commission collect Taxpayer Identifying Numbers (TIN), also referred to as "Taxpayer Identification Numbers," and share them with the U.S. Treasury to ensure that the Commission does not refund monies to entities that have an outstanding debt with the federal government. Individuals use their Social Security Number as their TIN.¹⁶ Employers use their Employer Identification Number ("EIN") as their TIN.¹⁷ The Financial Management Service of the U.S. Treasury has recommended that agencies obtain the TIN when an agency first has direct contact with a person.¹⁸

13. *Discussion.* We invite comment on using TINs in a manner analogous to their proposed use in the Wireless Bureau's Universal Licensing System.¹⁹ Under our proposal, all parties that submit broadcast applications electronically would be required to submit a TIN as a prerequisite for using the system, and the Mass Media Bureau would use TINs as the unique identifier for such parties. Parties submitting applications manually would also be required to supply their TIN on their application form, because all such applications will be scanned into the electronic filing system, and a TIN is necessary to track these applications for DCIA purposes. Parties seeking to file a pleading electronically would not be required to submit a TIN, but they would be permitted to register using a unique identifier and password of their choosing.²⁰ Members of the public would not be required to register simply to view applications.

14. We seek comment on whether requiring the use of TINs would satisfy the requirements of the DCIA, and whether it would provide a unique identifier for parties filing broadcast applications that would

¹⁶ Therefore, for the purposes of this *NPRM*, the term "Taxpayer Identification Number" shall mean "Social Security Number" for individuals.

¹⁷ Such numbers are sometimes referred to as Federal Identification Numbers ("FIN"). EINs are issued by the IRS to all employers whether or not they pay taxes. These employers include corporations, sole proprietors, partnerships, state and local governments, limited liability companies, non-profit organizations, and federal government/military agencies.

¹⁸ The authority to collect TINs is found in 31 U.S.C. § 7701(c)(1).

¹⁹ *ULS Notice* ¶¶ 71-75.

²⁰ Registering an identifier and password would be optional. These identifiers would be used solely to identify the entity making the filing so that once the relevant administrative information is in our database it can be prefiled on the pleadings form when the same entity makes subsequent filings.

ensure that the system functions properly. We would take steps to prevent misuse of TINs. For example, the electronic filing system would be designed so that TINs would not be available to the public. In addition, we could limit the number of Commission employees who would have access to TIN information in conjunction with their work.

15. As an alternative, we seek comment on using unique system-generated identifiers. These identifiers would be generated by the Bureau's database and would be assigned to filers in the following manner: The first four digits would represent the year, followed by the month and the day. For example, 20010122 would represent January 22, 2001. This number would be followed by a three-character alphanumeric sequence in the ranges of "a" to "z" and "0" to "9." The identifier would also represent the application's file number.²¹

16. Finally, a Privacy Act submission would be published in the *Federal Register* to obtain the requisite public and congressional comment and Office of Management and Budget ("OMB") approval prior to implementation of the electronic filing system. We seek comment on these proposals.

B. Streamlining Application Processing

17. As noted, the transition from paper to electronic filing creates significant opportunities to streamline and improve the way in which applications are processed. Moreover, the elimination of manual data entry would result in the Commission's databases more accurately reflecting the data filed in applications. Electronic filing could speed application processing and enhance public access to application information. It would also permit for the first time the electronic processing of many portions of broadcast applications. However, the current versions of most Mass Media Bureau forms rely to a significant extent on open-ended narrative exhibits and document submissions. We could not obtain the full benefits of electronic filing and processing simply by converting the current version of each form into an electronic format. Accordingly, we believe that it is necessary to undertake a thorough review of our broadcast forms and to reconsider both the information that is collected and the form in which it is submitted.

18. We purposely choose to concentrate first on those application forms that constitute the bulk of filings made by full service radio and television broadcasters and to which the Mass Media Bureau currently allocates a significant portion of its processing resources. Thus, we consider changes to the license and permit assignment and transfer forms -- Forms 314, 315 and 316; the new commercial station/technical modification form -- Form 301; the construction permit extension form -- Form 307; and the annual ownership report for commercial stations -- Form 323.²² For Forms 314, 315, 316, and 301, we have attempted to recast as many questions as possible into an electronic "filing friendly" format, replacing required exhibits with certifications and "yes/no" questions. We tentatively conclude that the broadcast application forms should restrict, to the maximum extent possible, the use of exhibits to waiver requests or where additional information is necessary to support application elements potentially inconsistent with precedent or processing standards. At the same time we have taken a fresh look at the information which we currently require, and propose to reduce

²¹ The system would rely upon TINs or unique identifiers to restrict access and ensure security. Similarly, applicants and licensees will use these numbers to identify themselves to the system.

²² Other forms listed in note 5, *supra*, also will be changed to permit electronic filing. We have attempted to use identical questions, where possible, across the universe of forms included in the conversion process. Thus, changes made to these other application forms will track to a significant extent changes made to the forms discussed more fully below. However, revisions to these other forms are not premised on rule changes, and therefore, are not discussed further in this Notice.

substantially the amount of information that applicants are now required to file. For Forms 307 and 323, we propose to restructure filing requirements altogether.

19. We believe these proposed changes would benefit broadcasters, the public and the Commission. As part of this process we are making significant revisions to the instructions to the Mass Media Bureau application forms and adding worksheets, where applicable, to help clarify Commission processing standards and rule interpretations. We anticipate that these changes would increase the percentage of applications that are complete and "acceptable" at the time of filing. By specifically enumerating in instruction materials the key factual predicates underlying certain certifications, we also believe that we would enhance the reliability of the information provided by applicants. Our fundamental goal is to provide applicants with sufficient guidance to intelligently certify compliance with our rules and policies. We view the expanded application form instructions as crucial to this process and therefore, propose to require each applicant to certify that it has read the instructions and disclosed fully in exhibits all matters about which there is any question regarding full compliance with the standards and criteria set forth in the instructions. We invite comment on this proposal. We seek comment on whether we should require licensees to retain worksheets for use in response to Commission audits or other Commission inquiries, or alternatively whether licensees should be required to place worksheets in their public inspection files. Moreover, we anticipate that staff would no longer need to meticulously review those applications in which an applicant's responses establish full compliance with our rules. We also propose to narrow or eliminate application questions of marginal importance and believe that these changes will not undermine the Commission's ability to make informed public interest determinations.

20. As part of this broad review of our processing practices, we also have scrutinized our substantive rules which significantly impact on our ability to efficiently process the applications which are under consideration in this proceeding. We tentatively conclude that some may no longer serve the public interest, as discussed below. Accordingly, we propose to eliminate or relax a number of technical and non-technical rules and filing requirements. If adopted, these changes would both reduce applicant filing burdens and streamline our processing of sales, new station, and facility modification applications. Attached as Appendix B are illustrative copies of several forms that incorporate the changes proposed herein. Attached as Appendix C are several draft worksheets which are designed to aid applicants in making informed application certifications. We emphasize that based on our experience with these fundamental changes in our application procedures, we may consider additional modifications to the forms, related software programs, and electronic filing procedures to simplify electronic filing for broadcasters and enhance Commission processing efficiencies.

*1. Assignment and Transfer Applications: Forms 314 and 315*²³

21. The Mass Media Bureau devotes considerable staff resources to processing the several thousand assignment and transfer applications it receives each year.²⁴ We believe that substantial benefits could be gained in this area from the implementation of electronic filing and processing. We have reviewed and propose substantial revisions to the sales application forms (FCC Forms 314 and 315). A number of proposed application form changes follow from our review of our assignment and transfer rules and the information currently collected as part of the sales application process. We propose to eliminate the rule restricting payments upon assignment or transfer of unbuilt stations. Further, we propose to eliminate the requirement

²³ The proposed changes in the processing of short form applications are discussed *infra* at paragraphs 69-81.

²⁴ In fiscal year 1997 alone, the Audio and Video Services Divisions combined received over 4600 assignment and transfer applications.

that applicants file sales agreements as part of the assignment or transfer application. In addition, we propose other changes that are not subject to the rulemaking requirements of the Administrative Procedure Act²⁵ and therefore may be implemented without notice and comment. Nonetheless, we believe the changes are substantial enough to warrant discussion here.

a. Rule Changes

(i) Payment Restrictions on the Sale of Unbuilt Stations

22. *Background.* Section 73.3597(c) of the Commission's rules restricts payments upon assignment or transfer of an unbuilt station to reimbursement of a seller's expenses ("no profit" rule).²⁶ The "no profit" rule requires that an application to assign or transfer an unbuilt station include declarations by both parties that the seller will not be reimbursed for more than out-of-pocket expenses.²⁷ In addition, Section 73.3597(d) provides that where the seller retains an interest in an unbuilt station, the Commission must consider whether the transaction involves actual or potential gain to the seller over and above reimbursement of expenses.²⁸ In such cases, our rules provide that the assignment or transfer application must be designated for hearing unless the transferor or assignor has obligated itself to provide the station with a capital contribution proportionate to the transferor's or assignor's equity share in the station for the one-year period commencing with program

²⁵ See 5 U.S.C.A. § 553(b)(3)(A).

²⁶ 47 C.F.R. § 73.3597(c) provides in pertinent part:

(1)(i) *Unbuilt Station* refers to an AM, FM or TV broadcast station or a low power TV or TV translator station for which a construction permit is outstanding, and, regardless of the stage of physical completion, as to which program tests have not been commenced or, if required, been authorized.

(2) The FCC will not consent to the assignment or transfer of control of the construction permit of an unbuilt station if the agreements or understandings between the parties provide for, or permit, payment to the seller of a sum in excess of the aggregate amount clearly shown to have been legitimately and prudently expended and to be expended by the seller, solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation.

47 C.F.R. § 73.3597(c)(1)(i) and (2).

²⁷ Section 73.3597(c)(3) provides in pertinent part:

(i) Applications for consent to the assignment of a construction permit or transfer of control shall, in the case of unbuilt stations, be accompanied by declarations by both the assignor (or transferor) and by the assignee (or transferee) that, except as clearly disclosed in detail in the applications, there are no agreements or understandings for reimbursement of the sellers expenses or other payments to the seller. . . .

(ii) When the seller is to receive reimbursement of his expenses, the applications of the parties shall include an itemized accounting of such expenses, together with such factual information as the parties rely upon for the requisite showing that those expenses represent legitimate and prudent outlays made solely for the purposes allowable under paragraph (c)(2) of this section.

47 C.F.R. § 73.3597(c)(3)(i) and (ii).

²⁸ 47 C.F.R. § 73.3597(d)(1).

tests.²⁹

23. The Commission adopted the current "no profit" rule as a mechanism to ensure that an applicant held the requisite intent to place a proposed station on the air and initiate service. The rule was intended "to preclude trafficking in construction permits for unbuilt stations by barring the use of such permits as a means of obtaining financial gain from their transfer before the original grantee builds and operates the station."³⁰ The Commission's adoption of the "no profit" limitation supplemented the adoption seven years earlier of the "three year rule," which provided that permittees seeking to assign or transfer a station held for less than three years would be required to make a compelling affirmative showing of unforeseen circumstances or hardship.³¹

24. When the Commission eliminated the "three year rule" in 1982, we announced that the Commission would "limit . . . action in this area to enforcing Sections 301 and 304 of the Communications Act,"³² which traditionally have been interpreted to provide, *inter alia*, that licenses issued by the Commission convey no property interest.³³ At that time, the Commission reasoned that the for-profit assignment or transfer of a construction permit prior to commencement of program tests violates the letter and spirit of these statutory provisions.³⁴ In addition, as a policy matter, the Commission stated that implicit in the filing of a construction permit application is an applicant's representation of intent to construct and promptly initiate service.³⁵ As a result, the Commission concluded that retention of the "no profit" limitation was necessary to maintain the integrity of the Commission's processes and to further the public interest objective of expeditious introduction of new service.³⁶ We also concluded that once a permittee commences operations, it has fulfilled its service commitment and therefore, the "no profit" limitation should no longer apply.³⁷

²⁹ 47 C.F.R. § 73.3597(d)(2).

³⁰ See *Assignment and Transfer of Construction Permits for New Broadcast Stations (Section 1.597 of the Commission's Rules)*, 16 FCC 2d 789, 789 (1969). Trafficking is defined as speculation, barter or trade in licenses. See *Amendment of Part I of the Commission's Rules Adding Section 1.365 Concerning Applications for Voluntary Assignments or Transfers of Control*, 32 FCC 689, 689 (1962).

³¹ *Amendment of Part I of the Commission's Rules Adding Section 1.365 Concerning Applications for Voluntary Assignments or Transfers of Control*, 32 FCC 689 (1962).

³² See *Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control)*, Report and Order, 52 RR 2d 1081, 1088 (1982) ("Trafficking Report and Order") (subsequent history omitted).

³³ *Trafficking Report and Order*, 52 RR 2d at 1089; see also *Applications for Voluntary Assignments or Transfers of Control*, Notice of Proposed Rulemaking, 47 Fed. Reg. 985, 987 (1982) ("Trafficking NPRM").

³⁴ *Trafficking Report and Order*, 52 RR 2d at 1089.

³⁵ *Id.* at 1083.

³⁶ *Id.* at 1089.

³⁷ *Id.* The Commission found, however, that in light of our concerns about the integrity of Commission processes, a one-year holding period should be imposed on those who obtain a permit through a comparative hearing. *Id.* This one-year holding period subsequently was imposed on permittees who obtained their permits through the Minority Ownership Policy. See *Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary*

25. *Discussion.* We now propose to eliminate the "no profit" rule.³⁸ Although the Commission previously concluded that the "no-profit" rule was mandated by statute when we eliminated the "three year rule," we subsequently held in *Bill Welch* that there is no *per se* statutory proscription against for-profit sales of unbuilt stations.³⁹ Rather, the Commission reasoned that Sections 301 and 304 of the Act "address congressional concerns that the Federal Government retain ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees who are permitted to use the frequencies."⁴⁰ The Commission concluded that the language of Sections 301 and 304 does not specifically prohibit sales of unbuilt construction permits and such sales are not inconsistent with the government's ultimate control over those licenses.⁴¹ Furthermore, the Commission found that the for-profit sale of the cellular authorizations obtained through a lottery was consistent with the public interest.⁴² While the Commission recognized that the for-profit sale of unbuilt cellular facilities may increase the risk of speculation, it found that the best approach to discourage speculation would be to review all assignment and transfer applications pursuant to the cellular service's "anti-trafficking" provision.⁴³

26. We believe that the statutory analysis set forth in *Bill Welch* remains correct, and therefore, that there is no statutory proscription against the for-profit sale of construction permits for unbuilt broadcast stations. Moreover, we no longer believe that retention of the rule is necessary to facilitate the introduction of new broadcast services or to maintain the integrity of our licensing process. With the initiation of competitive bidding for broadcast spectrum in situations where mutually exclusive applications are filed, we believe that the winning bidder's payment of fair market value for a construction permit combined with a restricted construction permit extension policy proposed *infra* will promote the prompt construction of broadcast facilities.⁴⁴ Moreover, our concern about spectrum speculation in an auction environment, where the winning

Assignments or Transfers of Control), Memorandum Opinion and Order, 99 FCC 2d 971 (1985).

³⁸ We note that our proposed modifications to our construction permit extension procedures would impact on the assignment and transfer of unbuilt stations. See *infra* ¶ 66.

³⁹ *Bill Welch*, 3 FCC Rcd 6502 (1988).

⁴⁰ *Id.* at 6503.

⁴¹ *Id.*

⁴² *Id.* at 6504. While the Commission concluded in *Bill Welch* that the for-profit sale of unbuilt cellular authorizations was not prohibited by statute and in the public interest, the Commission specifically stated that its decision on statutory grounds would not affect the prohibition of such for-profit sales in the broadcast service. *Id.* at 6505 n.26.

⁴³ *Id.* Section 22.139 of the Commission's rules provides, *inter alia*, that "[c]arriers must not obtain or attempt to obtain an authorization in the Public Mobile services for the principal purpose of speculation or profitable resale of the authorization, but rather for the provision of common carrier telecommunication services to the public." 47 C.F.R. § 22.139.

⁴⁴ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Notice of Proposed Rulemaking, MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, FCC 97-397 (rel. November 26, 1997) ("*Auction NPRM*"); see also Notice *infra* ¶ 59. In the *Auction NPRM*, we tentatively concluded that competitive bidding is statutorily mandated for mutually exclusive applications for secondary services, whether such applications were filed before or

bidder has paid, axiomatically, fair market value for an authorization, is significantly less than in *Bill Welch*, in which a cellular authorization was obtained in a lottery. Thus, we tentatively conclude that we should follow the same construction permit sale policy which is followed in other services subject to auction procedures.⁴⁵

27. We recognize that the Commission will not be conducting auctions to assign construction permits in every context. For example, we may decide not to use auction procedures for noncommercial station licenses.⁴⁶ Also, we may receive applications that attract no competing applications ("singletons") and thus would not be auctionable. We seek comment on whether the fact that a construction permit may not be issued through auction should cause us to retain the "no profit" rule in such situations. We specifically invite commenters to discuss the pros and cons of applying the "no profit" rule in cases where no auction takes place.⁴⁷

28. We tentatively conclude that reimbursement restrictions should also be eliminated for outstanding construction permits. Existing permittees acquired their authorizations under the current limitations, without any reasonable expectation that there would be an opportunity to sell at a profit prior to the initiation of service. It also appears that a number of commercial station construction permits will be issued prior to the implementation of competitive bidding, primarily as a result of settlement agreements facilitated by Section 309(l)(3) of the Balanced Budget Act of 1997.⁴⁸ Section 309(l)(3) requires the Commission to waive, *inter alia*, the "no profit" rule with regard to settlements among certain applicants entered into by February 1, 1998.⁴⁹ We tentatively conclude that we also should permit the for-profit sale of these construction permits, which to a certain extent have already been subject to private competitive forces. More generally, we believe that sales to serious buyers willing to acquire construction permits at fair market value and under strict construction requirements will help ensure the prompt initiation of new service. Moreover, this reasoning appears to apply equally to both outstanding construction permits and those that will be issued before the implementation of competitive bidding procedures. We seek comment on these tentative conclusions.

29. If we retain the current "no profit" rule, we propose to allow permittees to certify compliance with the rule by answering a series of "yes/no" questions. For example, a permittee would be required to certify that it has not included any expenses for services rendered by any of its principals and that there are no consulting or future employment agreements between the permittee and the assignee that are part of the consideration for assignment of the permit to the proposed assignee. The Commission would continue to have the authority to

after July 1, 1997. See *Auction NPRM* ¶¶ 39-41. Were the Commission to subsequently reach a different conclusion, we would need to reevaluate whether the "no profit" rule should continue to apply to the assignment and transfer of low power TV and TV translator stations.

⁴⁵ See e.g. 47 C.F.R. § 24.839.

⁴⁶ See Section 3002(a)(1)(A)(2)(C), Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251.

⁴⁷ We note that a proceeding is pending to develop comparative criteria to select among mutually exclusive noncommercial station applicants. See *Reexamination of the Comparative Standards for New Noncommercial Educational Applicants, Notice of Proposed Rule Making*, 10 FCC Rcd 2877 (1995). Such applicants are now subject to a processing freeze. *Id.*

⁴⁸ Pub. L. No. 105-33, 111 Stat. 251 (1997).

⁴⁹ See *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 1253, 1255-56 (1997).

request an itemized accounting of expenses on a case-by-case basis where disclosures in an application raise issues or concerns.⁵⁰ We seek comment on the appropriateness of allowing permittees to certify compliance, and particularly on our proposal to allow a seller to certify that it will not be reimbursed for more than its out-of-pocket expenses. We also request comment on whether it would be sufficient to require sellers to place copies of all expense documentation in a station's public file if the no-profit rule is retained.

(ii) *Requirement to Submit Contracts with Assignment and Transfer Applications*

30. *Background.* In connection with our broad review of the Mass Media Bureau's processing practices, we have reviewed the information that currently is collected as part of the application process. The current sales forms, FCC Forms 314, 315 and 316, require that the seller submit a copy of the contract and/or agreement for the assignment or transfer of the station, or if the agreement has not been reduced to writing, a written description of the complete oral agreement. In addition, Section 73.3613(b) of the Commission's rules requires that licensees and permittees file with the Commission any documents relating to the present or future ownership or control of the licensee or permittee within thirty days of execution.⁵¹ The Commission has used the sales agreement, together with the application, to understand the overall structure of each transaction involving the assignment or transfer of a broadcast authorization. These documents also have enabled the Commission to independently verify compliance with various rules, including the Commission's prohibition against reversionary interests, and to ensure that a non-party cannot exercise undue influence over an assignee or transferee.

31. *Discussion.* We propose to eliminate the requirement that such contracts and/or agreements be filed as part of assignment or transfer applications as well as the portion of Section 73.3613(b) that requires that such agreements be filed with the Commission within thirty days of execution.⁵² To the extent that we can rely on applicants' certifications regarding the contents of sales agreements rather than on a direct review of the relevant documents, the Commission could achieve significant resource savings. However, we also recognize that any processing changes must not impede our ability to discharge our obligation under Section 310(d) of the Act to grant only those applications that serve the public interest, convenience and necessity and must preserve the public's ability to monitor and participate in the consideration of sales applications.

32. In lieu of the requirement that applicants file the agreements and/or contracts with the application,

⁵⁰ See 47 C.F.R. § 1.17 ("The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination of whether a license should be revoked, or to some other matter within the jurisdiction of the Commission.").

⁵¹ 47 C.F.R. § 73.3613(b).

⁵² We note that in the *Auction NPRM*, we proposed to conduct broadcast spectrum auctions in conformity with the general competitive bidding rules set forth in Part I, Subpart Q of the Commission's rules. See *Auction NPRM* ¶ 51. Section 1.2111 of the Commission's rules provides that where a license has been obtained through a competitive bidding procedure, an applicant seeking approval to assign or transfer control of such license within the first three years of obtaining the license must file with the Commission the relevant assignment or transfer agreements or contracts. We recognize that Section 1.2111 is inconsistent with our proposal here to eliminate the requirement that applicants file assignment and transfer agreements with the application. In the *Auction NPRM*, we have sought comment on whether there are any general competitive bidding rules that are inappropriate in the context of broadcast auctions. *Id.* We intend to ensure that the rules adopted in this proceeding are consistent with the rules adopted in the pending broadcast auction proceeding.

we propose to require applicants to carefully and thoroughly review their sales and organizational documents against the detailed standards set forth in the instructions to Forms 314 and 315.⁵³ These standards have been designed to identify the core issues that the Commission passes on now when it reviews the actual agreements and/or contracts. We propose to expand application instructions to cover both the sales and loan agreements and also issues relating to non-party investor influence over the assignee or transferee. We also believe that a checklist of criteria regarding investor insulation would clarify the limited scope of insulated investor involvement in a licensee entity. Applicants would be required to disclose fully any sales, financing or investor information where the transaction or the assignee entity does not conform fully to the standards set forth in the instructions. However, we may request copies of agreements on a case-by-case basis where disclosures made in an application raise issues or concerns.⁵⁴ We seek comment on whether the proposed application procedures and certifications would suffice instead of the requirement that applicants file the sales agreements with their applications. In particular, we seek comment on whether the proposed instruction materials and related certifications would suffice instead of individualized review of agreements and contracts where complex transactions are involved. Finally, we seek comment on whether these procedures are sufficient to discharge our obligation under Section 310(d) of the Act to grant only those applications that serve the public interest, convenience and necessity.

33. If the Commission eliminates the requirement that applicants file sales agreements with their applications and the rule requiring that such agreements be filed with the Commission within thirty days of execution, we propose to require that applicants place all such agreements in the station's public inspection file and to modify our public inspection file rule accordingly. The revised assignment and transfer forms would require the current permittee or licensee to certify that this has been done. However, we are concerned about preserving meaningful public participation under Section 309(d) of the Act and minimizing applicant filing burdens.⁵⁵ Are the proposed procedures sufficient to permit the public to monitor station transactions? Does Section 309(d) of the Act effectively mandate that we require applicants to place copies of sales agreements in their public inspection files or some other place? We also seek comment on the impact of ending the practice of having sales agreements available for inspection in the Commission's Washington, D.C. public reference room.

(iii) Requirement to Submit Contour Overlap Maps

34. With regard to radio applicants, we propose to reduce administrative burdens on broadcasters and at the same time streamline the staff review process by eliminating the requirement that applicants submit contour overlap maps to demonstrate compliance with our local radio ownership rules. We propose to rely on applicant certifications in place of contour maps. An applicant would be in a position to make this local radio ownership certification only after completing a worksheet.⁵⁶ To the extent a proposed transaction would involve more than one "market," as that term is defined in Section 73.3555(a)(4)(ii), we would require the applicant to complete the worksheet with regard to each such market. We seek comment on this proposal. In particular, we seek comment on whether our elimination of the requirement that applicants submit contour

⁵³ See Appendix C, FCC Form 314 Worksheets

⁵⁴ See *supra* n. 50.

⁵⁵ See 47 U.S.C. § 309(d).

⁵⁶ See Appendix C, Worksheet # 1.

overlap maps will detrimentally affect the public's ability to access the information necessary to monitor station sales and thereby undermine the opportunity for meaningful public participation under Section 309(d) of the Act.⁵⁷ In connection with these changes, we also seek comment on whether we should require an applicant to place a copy of the contour overlap map in the station's public inspection file. It is our belief that most applicants that propose to hold multiple radio interests in a single area would need to prepare contour overlap maps to meaningfully and accurately complete the worksheet and answer the related application certification question, regardless of whether there is a Commission filing requirement. We also seek comment on whether applicants should be exempt from the public file requirement in those situations in which compliance is obvious, *e.g.*, where a certification is premised on the fact there are forty-five or more stations in a major market. We seek comment of whether we should require an applicant to prepare a map solely for placement in the station's public inspection file in such circumstances.

b. Other Revisions

35. As noted above, we also propose revisions to the sales forms (FCC Forms 314 and 315) that do not require changes in our rules. These changes are intended to maximize the advantages of electronic filing and processing and eliminate burdensome disclosure requirements. As noted above, these proposed form changes are not subject to the Administrative Procedure Act's notice and comment rulemaking requirements.⁵⁸ Nevertheless, we believe that comment on the proposed revisions is warranted. We urge interested parties to review the draft forms carefully so that meaningful comments may be submitted regarding the proposed revisions in the forms.

2. New Commercial Station and Facility Change Applications: Form 301

a. Rule Revisions

36. Form 301 is used to propose new stations, as well as major and minor changes to authorized facilities in the commercial television, FM and AM services. In order to more fully realize our goals of simplifying the preparation of the technical portion of Form 301 and reducing paperwork for broadcast applicants, we propose to modify or eliminate filing and reporting requirements codified in three Commission rules: 47 C.F.R. §§ 73.316(c) (FM directional antenna systems), 73.1030(a) (Notifications concerning interference to radio astronomy and radio research installations) and 73.1675(a) (Auxiliary antennas).

(i) Section 73.316(c)

37. We propose to modify Section 73.316(c) to shift the filing requirements now codified in subsections (1)-(2) and (4)-(7) from the construction permit phase to the license phase of the FM authorization process.⁵⁹ Subsections (1) and (4) of 47 C.F.R. § 73.316(c) require the submission as part of Form 301 of information regarding directional antenna manufacturer and type, and a vertical plane pattern plot. In practice, however, we have not needed such information until the license stage of the authorization process.⁶⁰ With

⁵⁷ See 47 U.S.C. § 309(d).

⁵⁸ See 5 U.S.C.A. § 553(b)(3)(A).

⁵⁹ See 47 C.F.R. § 73.316(c).

⁶⁰ See *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit* in MM Docket 96-58, 12 FCC Rcd 12371, 12404-05 (1997) ("One Step

regard to subsection (c)(1), the Commission recognized in the *One Step Licensing Report and Order* that in many cases the construction permit applicant has not selected an antenna manufacturer or model type.⁶¹ As to the vertical plane pattern plot required by (c)(4), the primary purpose of this information is to demonstrate that a directional antenna's actual performance comports with the Commission's technical standards. Thus, we recognized in the *One Step Licensing Report and Order* that vertical plane pattern plots "should be supplied with the licens[e] application."⁶² We now propose to change the rule to require the information set forth in these subsections only at the license application stage of the FM authorization process.

38. Section 73.316(c)(2) requires that FM applicants submit as part of Form 301 a composite pattern plot for proposed directional antennas. A composite pattern tabulation, however, is sufficient for processing such applications. In practice, the staff also has required submission of such a plot (based on the antenna's actual, rather than its theoretical, composite pattern) with the FM license application, as part of a directional antenna's proof of performance. We now propose to modify Section 73.316(c)(2) to require the submission of a measured composite pattern plot with only the license application and to permit FM applicants to file tabulated composite pattern data with Form 301. This proposed modification would reduce paperwork for FM applicants, who in practice now are required to submit such plots twice during the authorization process. It also would codify the processing requirement that plots be submitted at the license stage. In order to conform the rule to the new and revised Section 73.310(a) (composite antenna pattern),⁶³ we also propose to substitute the term "composite antenna pattern" for the following language in the present Section 73.316(c)(2): "relative field horizontal plane pattern" with "[a] single pattern encompassing both the horizontal and vertical polarization . . . , rather than separate patterns for horizontal and vertical polarization."

39. Subsections (5) through (7) of the present Section 73.316(c) require the submission with the FM construction permit application of directional antenna mounting data. We propose to modify these subsections to limit this disclosure requirement to license applications and to conform subsections (5) through (7) with subsection (8) of Section 73.316(c), which currently requires that applicants establish rule compliance at the license application stage. We anticipate that these changes to Section 73.316(c) would simplify the overall authorization process for FM applicants proposing the use of directional antennas.

(ii) *Section 73.1030(a)*

40. Section 73.1030(a) protects radio astronomy and radio research installations in West Virginia and Puerto Rico from interference by proposed new or modified broadcast facilities. The rule requires applicants in specified areas to notify the observatories of their proposals prior to or simultaneously with the filing of their applications with the Commission and we propose no change in this procedure.⁶⁴ The Commission then allows the observatories a 20-day comment period. The present rule specifies that applicants must disclose the date of notification to the observatory. We believe that this disclosure requirement is superfluous because Section

Licensing Report and Order").

⁶¹ *Id.*

⁶² *Id.* at 12405.

⁶³ See *One Step Licensing Report and Order*, 12 FCC Rcd at 12386 and 12431.

⁶⁴ 47 C.F.R. § 1030(a); see *Amendment of the Commission's Rules to Establish a Radio Astronomy Coordination Zone in Puerto Rico*, Report and Order in ET Docket No. 96-2, 12 FCC Rcd 16522 (1997) ("Puerto Rico Report and Order").

73.1030(a) requires applicants to provide the required notice no later than the filing date of the application. The 20-day period for comment or objection necessarily commences on the filing date.⁶⁵ Accordingly, we propose to modify Section 73.1030(a) by eliminating the requirement that applicants indicate in their applications the date of observatory notification. The staff could determine automatically based upon a proposed facility's coordinates whether Section 73.1030(a) is applicable, and where the rule applies, automatically provide the observatory in question the requisite 20-day comment period, commencing on the filing date of the application.⁶⁶

(iii) *Section 73.1675(a)*

41. Section 73.1675(a) provides that the service contour of a proposed broadcast auxiliary operation must not exceed the specified corresponding contour for the licensed main station operation. The rule requires broadcast applicants to submit maps demonstrating compliance with this provision in support of their construction permit applications. Staff rarely relies on these maps because the Commission now has the tools to automatically verify compliance with Section 73.1675(a) based upon technical facility data required by Form 301. Accordingly, we propose to modify the rule to eliminate the map requirement for auxiliary facilities for the FM and TV broadcast services. Although we believe that the rationale for eliminating the Section 73.1675(a) map requirement is equally applicable to the FM and TV broadcast services, we propose to retain the map requirement for AM auxiliary facility permit applications. Determining service contours for AM facilities requires conductivity measurement data which our databases do not contain at this time. Therefore, verification of compliance with Section 73.1675(a) for AM auxiliary facilities still requires manual processing.

42. In sum, we believe that these proposed rule modifications would simplify and make less burdensome the Form 301 application process. Moreover, we believe that adoption of these changes would not jeopardize the technical integrity of the broadcast services or the consistent enforcement of our core rules and policies. We also believe that these proposals would not diminish the public's ability to monitor or comment on these facility applications. We seek comments on these modifications, and request additional suggestions to eliminate or streamline reporting and filing requirements which relate to Form 301 filings.

b. *Form Revisions*

43. We also propose to reorganize and streamline FCC Form 301. The proposed revisions are intended to reduce applicant filing burdens and increase application processing efficiencies. First, we propose to conform Forms 301, 314 and 315 non-technical questions where regulatory concerns are identical. Thus, the non-technical portions of Form 301 would substantially duplicate the proposed new assignment and transfer forms. In addition, we propose to reorganize the FM technical data section of the application, Section V-B. Section V-B presently requires FM broadcast applicants to demonstrate compliance with our technical rules through submission of complex and detailed technical exhibits. These technical exhibits are not submitted in a form or manner amenable to computer data entry or analysis and, therefore, require manual processing by

⁶⁵ See *Puerto Rico Report and Order*, 12 FCC Rcd at 16531 (rejecting proposal that applicants be allowed to trigger commencement of the 20-day period prior to filing their applications).

⁶⁶ In addition to eliminating the Section 73.1030(a) reporting requirement, we propose to make the internal organization of the rule more consistent by designating the present subsection (a) as subsection (a)(1). See *Puerto Rico Report and Order*, 12 FCC Rcd at 16546 (creating new subsection (a)(2)). We also propose to conform the present subsection (a) to subsection (a)(2) by specifying that applicants under the former may provide the requisite notification prior to, as well as simultaneously with, the filing of their applications. See 47 C.F.R. § 73.1030(a) and (a)(2)(ii); *Puerto Rico Report and Order* 12 FCC Rcd at 16531.

the engineering staff. The revised Section V-B would require applicants to certify compliance with our technical rules for routine and non-waiver issues. The technical data required for engineering review would be organized in such a manner as to facilitate electronic entry of the data and, in some instances, allow our computer engineering programs to verify compliance with our technical rules. Consistent with our overall streamlining goals, we also propose to eliminate certain burdensome, duplicative or marginally relevant questions.⁶⁷

44. The revised Section V-B would consist of a certification section and a discrete technical section or "Tech Box." The certification section would consist of a number of "yes/no" questions regarding compliance with the Commission's technical rules. While Section V-B currently requires as many as 14 exhibits, the revised version normally would require no more than one or two exhibits. Exhibits would be required only in connection with the most critical technical and public safety matters, such as FM spacing, contour protection, and radiofrequency electromagnetic exposure guidelines. Applications with verified "yes" answers to all certification questions and with all necessary exhibits attached would be processed on an expedited basis. All other applications would be handled on a case-by-case basis. The revised Form 301 would also include detailed instructions to assist applicants in preparing the technical portion of the form.

45. The "Tech Box" would cover all critical technical data required for engineering review. Presently, questions and filing requirements pertaining to technical data are interspersed throughout Section V-B. We have found that this organization results in minor errors and application discrepancies, necessitating repeated staff requests for explanations and amendments. Such requests delay processing and tax the Commission's limited resources. We anticipate that the "Tech Box" would help eliminate this problem. In the event of any discrepancies between data in the "Tech Box" and data submitted elsewhere in the application, the data in the "Tech Box" would be controlling. Use of the "Tech Box" also would facilitate electronic data entry and allow the Commission's computer engineering programs to perform automatically certain review functions now performed by the staff.

46. We believe that the revised Form 301, together with the proposed modifications to our codified filing requirements discussed above, would reduce the administrative burden of the broadcast application process and make possible more efficient allocation of staff resources without compromising our ability to maintain the technical integrity of broadcast services, enforce our core rules and policies and permit members of the public to monitor applications.⁶⁸

C. Enforcement

⁶⁷ For example, we propose to eliminate Questions 7(a)(3) and 7(b)(2) of the current Section V-B relating to site elevation and height of radiation center above mean sea level, the answers to which questions may be derived easily from other data required by the technical portion of the form. Similarly, applicants would no longer submit Federal Aviation Administration ("FAA") information, including copies of FAA determinations because this information can be accessed through the FCC antenna structure registration number included in the application. We also propose to eliminate the sketch of the supporting antenna structure required by Question 8 of the current Section V-B.

⁶⁸ In order to facilitate the auction process, the Commission proposed to eliminate tenderability and two-tiered minimum filing requirements for new and major change FM applications in the *Auction NPRM*. See *Auction NPRM* ¶ 78. We believe the rationale underlying this auction-related processing proposal applies only to new and major change applications. See *id.* In light of the revisions we are proposing herein to our application forms and processing procedures, however, we invite comment on whether we also should modify the tenderability and two-tier processing standards for minor change FM applications. 47 C.F.R. § 73.3564.

47. We have proposed substantial revisions to our applications forms and processing procedures. These would significantly streamline the amount of information that applicants must furnish to the Commission. We would rely more heavily on certifications by applicants that they comply with the applicable rules. By so doing, we do not intend at all to lower our expectation that licensees conduct themselves as public trustees. Under the Communications Act we retain the obligation to ensure that licensees continue to serve the public interest and comply with the Commission's rules.

48. Similarly, our proposals to relax or eliminate some of our rules and policies should not be taken to mean that we will not take seriously the rules and policies that remain. In fact, in a deregulatory setting, where regulatory burdens are decreased, a permittee's or licensee's unwillingness or inability to comply with the remaining rules has even greater significance. Accordingly, we seek to ensure that our enforcement policies remain adequate in light of our streamlining efforts. Current enforcement measures applied by the Commission range from admonitions to forfeitures to conducting hearings to determine whether to revoke or deny renewal of a broadcaster's license. We invite comment as to whether our existing enforcement measures and policies remain sufficient.

49. We note that if the proposed revisions to our application forms and processing procedures are adopted, we intend to have a formal program of random audits to ensure that licensees continue to comply with our rules and we intend to rely heavily on such audits. We invite comments as to how we should implement such audits and whether such audits are sufficient means of ensuring continued licensee compliance with our rules and policies. If not, we invite comment as to what additional measures, if any, we should adopt.

50. We reiterate that we take seriously permittees' and licensees' representations to the Commission. We will not hesitate to impose strong sanctions in the event that we find that misrepresentation has occurred with respect to any such permittee or licensee certifications in whatever streamlined applications we adopt. Candor is one of the highest obligations of a licensee or permittee, as we rely to a great extent on representations made in applications and other filings with the Commission.⁶⁹

D. Modifying Construction Permit Extension Procedures

51. *Background.* The Act provides that the Commission may not grant a license for a broadcast station without first issuing a construction permit specifying the operating and construction parameters for the facility, including the date on which the facility must be completed and ready for operation.⁷⁰ Whether for a new facility or for a modification of a licensed station, the Commission issues a construction permit for either 24 months (for full power TV) or 18 months (for AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator, FM booster, broadcast auxiliary, or Instructional TV Fixed station

⁶⁹ *E.g., Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994) (applicant disqualified in comparative broadcast proceeding for lack of candor); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (license renewal denied based on lack of candor).

⁷⁰ 47 U.S.C. §§ 318, 319(a)-(b). Section 319(d) of the Telecommunications Act of 1996, however, allows the Commission to implement regulations regarding minor changes to licensed facilities whereby a modified license may be issued without prior issuance of a construction permit. The Commission has recently implemented "one-step" licensing procedures that can be used in specified circumstances. *See Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371 (1997); 47 C.F.R. § 73.1690.

("ITFS")).⁷¹ Within the specified time frame, a permittee must complete construction and file an application for a license to cover.

52. If a permittee fails to complete construction within the time period specified in its construction permit, the Act provides that the construction permit will be automatically forfeited unless the delay was caused by circumstances that were not within the permittee's control or the Commission, in its discretion, authorizes additional time.⁷² Under our rules, we use identical criteria to determine whether authorization of additional time is in the public interest, regardless of whether the construction permit is for a new station or a proposed modification of a licensed station.⁷³ Specifically, we authorize a permittee additional time to complete construction when it can demonstrate one of the following three conditions: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made, *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.⁷⁴ A permittee that makes a satisfactory "one-in-three" showing (*i.e.*, satisfies one of the above-three criteria) is afforded up to an additional six months within which to complete construction. If the permittee fails to complete construction prior to the expiration of this additional period, the construction permit is once again subject to forfeiture unless the Commission grants a further extension of time based on a satisfactory "one-in-three" showing for the most recent construction period.⁷⁵

53. Our rules also allow a permittee to file an application to modify a construction permit or to file an application either to assign or transfer control of a construction permit. If an application to modify a construction permit, or an application to assign or transfer control of a construction permit, is filed outside the first half of the construction permit's initially authorized period (*i.e.*, after the first 12 of the initial 24 months of a full power TV construction permit or after the first nine of the initial 18 months of a construction permit

⁷¹ 47 C.F.R. § 73.3598(a)-(b). Although the construction period for ITFS is set forth in Section 73.3598, ITFS is a point-to-point microwave (non-broadcast) service and is therefore outside the scope of the proposals contained in this Mass Media streamlining initiative.

⁷² See 47 U.S.C. § 319(b). Our rule implementing § 319(b) provides that a construction permit "shall be declared forfeited if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notice of the forfeiture of any construction permit under this provision will be placed in the records of the FCC as of the expiration date." 47 C.F.R. § 73.3599.

⁷³ 47 C.F.R. §§ 73.3534(b). Applications for extension of time are made on FCC Form 307.

⁷⁴ *Id.* The same criteria are also used to determine whether a permittee that has allowed its construction permit to expire prior to requesting an extension should be afforded additional time to construct. Our rules refer to a post-expiration request as a "replacement" rather than an "extension." See 47 C.F.R. § 73.3534(e). Extensions for International Broadcast are processed under more general guidelines. See 47 C.F.R. § 73.3534(c) (permittee may either demonstrate that its failure to complete was due to causes that were beyond its control or may provide other information "sufficient to justify an extension.").

⁷⁵ In determining whether an extension is warranted, the Commission will only look at the most recent authorized construction period. See *Rainbow Broadcasting Company*, 9 FCC Rcd 2839, 2846 (1994), *rev'd on other grounds sub nom. Press Broadcasting Company v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995); *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991).

for other facilities) the permittee must make the same "one-in-three" showing discussed above.⁷⁶ When an application to modify a construction permit is granted, the time period allowed for construction is six months from the issuance of the authorization to modify or the remainder of the construction permit's already authorized construction period, whichever is longer.⁷⁷ When an application to assign or transfer control of a construction permit is granted, the construction permit is extended for 12 months from the consummation of the assignment or transfer of control, unless, at the time of consummation, more than 12 months is remaining in the construction permit's already authorized construction period.⁷⁸

54. Section 319 of the Act and our rules governing construction permits, described above, are intended to strike a balance between our fundamental interest in expediting new service to the public and in preventing the warehousing of scarce spectrum and our recognition that there are sometimes legitimate obstacles which prevent the rapid construction of broadcast facilities. On several occasions we have lengthened construction periods to conform our policies to changes in broadcast technology and the broadcast marketplace, as well as to respond to the ever-increasing tide of applications for extensions.

55. From 1934 to 1970, permittees were afforded eight months for construction. During this era, several significant developments occurred in the broadcast marketplace, including the introduction of both FM and TV broadcast services. To address these changes, in 1970, we established an 18-month construction period for TV stations and increased the construction period for radio permittees to 12 months.⁷⁹ We also used that rulemaking to announce our intention to strictly scrutinize applications for additional construction time and to deny all that failed to show compelling public interest benefits justifying their grant.⁸⁰

56. In 1985, citing the increasing complexity of construction, scarcity of equipment suppliers and growing complexity in the design and construction of broadcast stations, we again amended our rules and increased the construction periods to the current terms of 24 months for TV permittees and 18 months for radio permittees.⁸¹ Furthermore, we eliminated grants of extension applications based on a "catch-all" demonstration that the public interest would be served by the extension of construction permit and we reasserted our intention

⁷⁶ 47 C.F.R. § 73.3535(a)-(b). Although 47 C.F.R. § 73.3535(d) specifies that we will not accept an application to modify a construction permit, or an application to assign or transfer control of a construction permit, filed after the initial construction period, the Commission has interpreted this rule to allow acceptance of such applications so long as the construction permit has not expired -- whether or not the permittee has received prior extensions of time to construct. See *Clarke Broadcasting Corp.*, 11 FCC Rcd 3057, 3057 n.5 (1996).

⁷⁷ 47 C.F.R. § 73.3535(c).

⁷⁸ *Id.* Historically, as discussed below, the staff has applied the "one-in-three" showing required by Section 73.3535 of the Commission's rules and the additional 12 month provision only to the assignments and transfers of control of construction permits to construct new stations (*i.e.*, the rule has not been applied to an application to assign or transfer control of a licensed station with an outstanding construction permit to modify facilities). Moreover, the staff applies Section 73.3535(c) of the Commission's rules only to "long-form" applications to assign or transfer control a construction permit (*i.e.*, applications on FCC Form 314 or 315).

⁷⁹ *Report and Order* in Docket No. 18763, 23 FCC 2d 274 (1970).

⁸⁰ *Id.* at 274-75.

⁸¹ See *Memorandum Opinion and Order* ("1985 MO&O"), 102 FCC 2d 1054, 1055 (1985).

to carefully scrutinize all extension applications.⁸² We expected that longer construction periods, in combination with the removal of the "catch-all" public interest showing and increased scrutiny, would significantly curb the substantial number of extension applications.

57. While many permittees are now able to complete construction within the initial construction period afforded under the current rules, it remains the case that a significant number of permittees do not succeed in constructing their proposed facilities prior to permit expiration. As a result, we continue to receive large numbers of extension applications each year. For example in 1996, the Mass Media Bureau's Audio Services Division alone received 617 applications to extend AM and FM construction permits. In 1997, that number increased more than 10 percent to 687. Although most of the extension applications we receive contain satisfactory "one-in-three" showings and, accordingly, are granted, substantial staff resources are required for the fact-intensive analysis involved in processing these applications.

58. In addition to the burden on staff resources, our current scheme places a substantial administrative burden on permittees and in some instances may actually create a barrier to prompt completion of construction. Specifically, if a permittee is unable to complete construction prior to expiration of the permit, the permittee is not only faced with the burden of completing and filing an extension application but the permittee must also wait a typical interval of two months while the staff processes the extension request. During this interval, after the permit has expired but before the staff has acted on the extension application, the permittee remains unsure of the construction permit's status (*i.e.*, the pending extension application might be denied) and therefore any construction progress made during this period is at a permittee's own risk. Given this uncertainty, many permittees choose not to proceed with construction while an extension application is pending.

59. *Discussion.* On the basis of our experience, we believe it is now time to further consider amending our Mass Media rules governing construction of facilities. As discussed more fully below, we propose to reduce the necessity for extensions by increasing the authorized construction period provided in an initial construction permit to a period that would allow sufficient time for a diligent permittee to complete construction of a facility, even if the permittee encounters significant construction difficulties. Specifically, we propose to: (1) issue all construction permits for a uniform three-year term; (2) extend permits only in circumstances where the permit itself is the subject of administrative or judicial appeal or where construction delays have been caused by an "act of God;" (3) eliminate the current practice of providing extra time for construction after a permit has been the subject of a modification or an assignment or transfer of control; and (4) make construction permits subject to automatic forfeiture upon expiration. Additionally, we propose to apply these rules to any construction permit that is within its initial construction period at the time these rules are adopted.

60. In addition to fulfilling our streamlining goals of reducing the necessity for extensions and thereby reducing paperwork and administrative burdens, we believe that our proposed changes coincide appropriately with the Commission's plan to issue construction permits to build new stations and to make major modifications

⁸² Prior to the 1985 MO&O, Section 73.3534 of the Commission's rules provided that extensions would be granted only "upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension." In applying this standard, the Commission granted extensions "where permittees [had] made bona fide efforts to meet their commitments and [took] substantial steps toward construction, where delays in construction resulted from unforeseen circumstances beyond the control of the permittee, or where the permittee [had] shown that the public interest would be served by the grant of the extension." *Northeast TV Cablevision Corp., et al.*, 21 FCC 2d 442, 444 (1970).

of licensed facilities through an auction process.⁸³ While we must obviously provide applicants who receive a broadcast authorization through the auction process an adequate period of time to construct their facilities, we believe that three years is a sufficient period and that a competitive bidding procedure will attract willing and able participants and thus promote the expeditious construction of facilities.⁸⁴

61. *Increased, Uniform Period For All Construction Permits.* As noted, we propose to issue all future construction permits, whether for full power or low power TV, TV translator, TV booster, AM, FM, FM translator, FM booster, International Broadcast, or broadcast auxiliary facilities, with a uniform three-year construction period. Furthermore, we propose to grant the proposed three-year construction period to all permits, whether for the construction of a new facility or for a modification of a licensed station. Based on our experience in granting extensions, we believe that an uninterrupted three-year construction period, combined with the tolling mechanism described in paragraph 64 *infra*, would provide adequate time in which any diligent permittee could successfully complete construction.

62. We invite comment on the need for, and relative merits of, a uniform period and we seek comment as to whether a three year term is appropriate. We solicit comments on typical construction time lines and problems, particularly where commenters support alternative permit time frames. We also seek comment as to whether the proposed longer construction period would remove an incentive for prompt construction by permittees who are capable of completing construction much earlier than the proposed three-year deadline. This question is particularly relevant regarding construction permits to modify licensed facilities and permits to construct secondary facilities where a three-year period might, in instances where the proposed changes do not require extensive construction efforts, be far more than a diligent permittee needs to successfully construct and therefore might promote spectrum warehousing. Commenters are specifically asked to comment on the extent to which construction permit applicants are not really prepared to and do not want to proceed promptly with construction when they apply, but rather are applying in an attempt to preserve some right for the future or to block other parties' potential plans. We also seek comment on whether we should impose a shorter construction period, *e.g.*, one year, for construction permits for minor modifications to licensed facilities. We particularly are concerned that under Section 73.208 of our rules, a three-year construction period for such permits would have a preclusive impact on the ability of other parties to file applications.⁸⁵

63. We propose not to apply the three-year construction period to the digital television ("DTV") facilities constructed by initial DTV licensees, which are on their own construction schedule.⁸⁶ However, in our *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order* the Commission established special construction rules for new NTSC permittees whose applications remained pending on April

⁸³ The Commission has proposed auctioning the broadcast spectrum as directed by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). See *Auction NPRM* ¶¶ 1, 6-7.

⁸⁴ See, *e.g.*, *Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5815 (1997); *Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Services*, 11 FCC Rcd 2472, 2473 (1996); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 2348, 2358 (1994).

⁸⁵ See 47 C.F.R. § 73.208(b) (station separation requirements in licensing proceedings are determined by protecting both licensed and permitted facilities).

⁸⁶ See *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997), *on reconsideration*, FCC 98-23, released February 23, 1998. See also *Sixth Report and Order* in MM Docket No. 87-268, FCC 97-115, released April 21, 1997, *on reconsideration*, FCC 98-24, released February 23, 1998.

3, 1997.⁸⁷ This limited class of permittees, which are not eligible for an initial DTV paired license, may construct either an analog or a digital station. These permittees also must complete construction with the "traditional" two-year construction period applied to NTSC stations,⁸⁸ and, if they initially construct analog facilities, may convert to DTV by the 2006 deadline. If we adopt the three-year construction period proposed in this *Notice*, we propose to increase to three years the initial period afforded these NTSC permittees to construct either analog or digital facilities. We propose no change in the 2006 deadline for converting to DTV. We invite comment as to whether the two-year period for this group of NTSC permittees should be extended to three years if we adopt the three-year proposal discussed herein.

64. *Restrict Extensions to Circumstances Where Delays Are Beyond the Permittee's Control.* As noted in paragraph 52 *supra*, Section 319(b) of the Act states that a construction permit will not be subject to forfeiture if delays have been caused by circumstances that are beyond a permittee's control. To comply with this statutory prohibition, we propose to toll the period of a construction permit when circumstances outside a permittee's control prevent construction. We propose, however, to strictly limit the circumstances that would qualify for such treatment. Specifically, we seek comment on whether we can limit the tolling of the construction period to when the grant of a construction permit is the subject of administrative or judicial appeals or when construction has been delayed by an "act of God." Moreover, we propose to define "acts of God" very narrowly in terms of natural disasters (e.g., floods, tornados, hurricanes, and earthquakes) and even then to only toll the construction period for the length of time which a diligent permittee would need to recover from the effects of the event, up to a maximum of one year. We also propose to require strict documentation of a permittee's efforts to build subsequent to such events.

65. Commenters are requested to address both the legal and economic consequences of this proposal and to suggest a mechanism by which a permittee would inform the Commission of natural disasters which have delayed construction and request the tolling of a construction period. We seek comment whether this proposed rule change would be consistent with Section 319(b) of the Act. Finally, we seek comment as to whether difficulties in obtaining local zoning authorization are sufficiently beyond the permittee's control to warrant treatment similar to that of delays caused by administrative and judicial review. Our tentative conclusion is that zoning delays can be overcome and construction can be completed within the proposed three-year construction period if a permittee pursues the zoning process diligently.

66. *Eliminate Post-Modification and Post-Assignment Extensions.* As previously noted in paragraph 53 *supra*, when a permittee for a new facility files an application to modify its construction permit, or an application to assign or transfer control of its construction permit outside the first half of the construction permit's initially authorized period, we currently require a "one-in-three" showing and, upon grant, we provide the permittee, in most instances, with additional time in which to complete construction. Since we believe that the proposed three-year construction period will provide sufficient time for completion, even when a construction permit has been the subject of further modification, assignment, or transfer, we propose to eliminate both the restriction on second-half construction period modifications and assignments and the extended construction periods provided under our rules. Thus, both a permittee that modifies an unbuilt station and a buyer of an unbuilt station would be held to a construction permit's original deadline, unless the period was subject to tolling as described in paragraph 64 *supra*. We seek comment on whether elimination of automatic extensions when unbuilt stations have been modified, assigned, or transferred is consistent with

⁸⁷ Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order in MM Docket No. 87-268, FCC 98-23, ¶¶ 11-16, released February 23, 1998.

⁸⁸ *Id.* ¶ 11.